No. A-232

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ST. LOUIS SOUTHWESTERN RAILWAY CO.,
Petitioner,

vs.

ROBERT WAYNE DICKERSON,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS EASTERN DISTRICT

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QUESTIONS PRESENTED FOR REVIEW

I. THE MISSOURI COURT OF APPEALS IN *DICKERSON V. ST. LOUIS SOUTHWESTERN RAILWAY COMPANY*, 674 S.W.2d 165 (MO. APP. 1984), DID NOT ERR IN AFFIRMING THE TRIAL COURT'S REFUSAL OF PETITIONER'S TENDERED "PRESENT VALUE" INSTRUCTION BECAUSE SAID INSTRUCTION IS NOT INCLUDED IN MISSOURI APPROVED INSTRUCTIONS AND STATE COURTS ARE TO FOLLOW STATE PRACTICE AND PROCEDURE IN F.E.L.A. CASES.

II. THE MISSOURI COURT OF APPEALS IN *DICKERSON V. ST. LOUIS SOUTHWESTERN RAILWAY COMPANY*, 674 S.W.2d 165, (MO.APP. 1984), DID NOT ERR IN AFFIRMING THE TRIAL COURT'S GIVING OF MISSOURI APPROVED INSTRUCTION 8.02 BECAUSE STATE COURTS ARE TO FOLLOW STATE PRACTICE AND PROCEDURE IN F.E.L.A. CASES AND SAID INSTRUCTION DID NOT INFRINGE UPON PETITIONER'S SUBSTANTIVE RIGHTS NOR DENY IT EQUAL PROTECTION.

III. THE MISSOURI COURT OF APPEALS IN *DICKERSON V. ST. LOUIS SOUTHWESTERN RAILWAY COMPANY*, 674 S.W.2d 165 (MO.APP. 1984) DID NOT ERR IN AFFIRMING THE TRIAL COURT'S ACCEPTANCE OF THE JURY VERDICT; DID NOT ERR IN CONCLUDING PETITIONER HAD NOT REQUESTED RELIEF IN THE TRIAL COURT BASED ON RESPONDENT'S COUNSEL'S ALLEGED IMPROPER ARGUMENT; AND DID NOT ERR IN AFFIRMING THE TRIAL COURT'S REFUSAL OF A "PRESENT VALUE" INSTRUCTION THAT IS NOT INCLUDED IN MISSOURI APPROVED INSTRUCTIONS.

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JURISDICTIONAL STATEMENT

In its petition for writ of certiorari, petitioner St. Louis Southwestern Railway Company has not properly invoked the jurisdiction of the United States Supreme Court. The petition states, "This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3)." Petitioner then states, "The questions presented involve the invalidity and unconstitutionality of certain pattern, mandatory jury instruction (sic) promulgated by the Missouri Supreme Court (Missouri Approved Instructions)[1] for FELA cases and a resultant excessive verdict in the Court of Appeals' decision in this case because it is contrary to the decisions of this Court and the Federal Courts of Appeal." (Footnote omitted.)

Petitioner's stated reasons to invoke the jurisdiction of this Court do not fall within any of the requirements of jurisdiction pursuant to 28 U.S.C. §1257(3): "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:...(3) by Writ of Certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity especially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Petitioner has not drawn into question the validity of a treaty or statute of the United States. Petitioner has not drawn into question the validity of a State statute on the grounds of its being repugnant to the Constitution, treaties or laws of the United States. Petitioner had not shown where any title, right, privilege or immunity especially set up or claimed under the Constitution, treaties or statutes, of, or commission held or authority exercised under, the United States, has been infringed.

Petitioner purports to invoke the jurisdiction of this Court because it claims the Missouri Court of Appeals' decision in this case is contrary to the decisions of this Court and the federal courts of appeal. Whereas a state court opinion in conflict with applicable decisions of this Court or a federal court of appeals could be a consideration governing review on certiorari pursuant to Supreme Court Rule 17, it does not invoke the jurisdiction of this Court. Based on its Jurisdictional Statement, petitioner has failed to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1257(3). In addition, petitioner has failed to comply with Supreme Court Rule 21 requiring a concise statement of the grounds on which jurisdiction of this Court is invoked.

If this Court has jurisdiction over petitioner's claims, the Court should decline to exercise that jurisdiction because petitioner's Questions for Review were not timely raised in the state trial court and are not properly before this Court. A constitutional question not raised in state court proceedings is not open in proceedings on petition for certiorari. *Ellis v. Dixon,* 349 U.S. 458, 75 S.Ct. 850, *rehearing denied* 350 U.S. 855, 76 S.Ct.37 (1955). The Supreme Court will not decide claims "not pressed or passed upon" in state court. *Illinois v. Gates,* 103 S.Ct. 2317, 2321-2322 (1983), *citing McGoldrick v. Compagnie Generale,* 309 U.S. 430, 435-436, 60 S.Ct. 670, 673 (1940) and *State Farm Mutual Automobile Insurance Company v. Duel,* 324 U.S. 154, 160, 65 S.Ct. 573, 576 (1945).

Petitioner's Question for Review I claims the Missouri Court of Appeals prejudicially erred in sustaining the trial court's refusal of a "present value" instruction tendered by petitioner. The giving of such an instruction to the jury by the court would not have been supported by the evidence. Petitioner presented no evidence whatsoever as to the present worth of the future lost earnings sustained by respondent. Petitioner did not offer any expert testimony concerning predicted future rates of inflation, the interest rate that appropriately could be used to discount future earnings to present value, or the possible connection between inflation rates and interest rates. Petitioner cannot now be heard to complain that it was deprived of a substantive right when it was given ample opportunity to present evidence. Not only did petitioner fail to present evidence as to present value, it made no offer of proof of the evidence that it could have presented to the trial court.

In addition, petitioner did not preserve its objection nor raise the federal issue it now is claiming. At the instruction conference in the trial court, the court refused petitioner's tendered instructions E through H. Instruction G was the "present value" instruction. (Instruction E stated the defendant was not an insurer of the safety of employees; Instruction F stated

defendant cannot be held liable because there may be a safer method of performing the work in question and Instruction H dealt with speculative damages.) Petitioner objected to the action of the court in refusing defendant's tendered instructions lettered E through H. Beyond this general objection, petitioner did not single out its objection to Instruction G nor raise the issue it is now raising that a "present value" instruction is required in all F.E.L.A. cases as a matter of federal law.

Petitioner's Question for Review II also raises an issue that was not presented in the state court below. Petitioner now claims it was denied equal protection under the law because the trial court submitted M.A.I. 8.02, the Missouri Approved Instruction for damages in personal injury F.E.L.A. cases. Petitioner did not tender a different damages instruction to the court. (See Petitioner's Appendix E, Instruction Conference.)

Although Missouri Supreme Court Rules do not require objection to instructions during an instruction conference, on appeal the Missouri Supreme Court will consider the failure to raise an issue during trial or to request a modification of an instruction. *See Hudson v. Carr,* 668 S.W.2d 68, 71-72 (Mo. en banc 1984) and *Fowler v. Park Corporation,* 673 S.W.2d 749 (Mo. en banc 1984). In *Fowler,* the Missouri Supreme Court described counsel's failure to object at the instruction conference as "sandbagging." *Id.* at 756. The Missouri Supreme Court will reverse only for "defects of substance with substantial potential for prejudicial effects." *Id.* Failure to raise the issue during trial or to request a modification is considered in determining whether an instruction is prejudicial. *Hudson,* 668 S.W.2d at 71-72.

In *Fowler,* the Missouri Supreme Court noted there has been a trend in recent years away from reversal for error in instructions unless there is a "substantial indication of prejudice." *Fowler,* 673 S.W.2d at 757. The court stated "lawyers take a chance in deliberate silence in the face of error..." *Id.* The court

in *Fowler* found the complaining party had waived his objections. Petitioner herein also waived its objections by failing to tender what it would consider to be the proper damages instruction.

Petitioner first raised its objection to the damages instruction in its Motion for New Trial. Petitioner did not, however, raise its present equal protection claim that defendants in personal injury actions under the F.E.L.A. are discriminated against irrationally and on an unreasonable basis when compared with other Missouri personal injury defendants and defendants in F.E.L.A. actions for wrongful death. Petitioner cannot now be heard to complain of the constitutional ramifications of such alleged classification. Petitioner did not raise the constitutional question at its first opportunity in the trial court and did not renew it in its Motion for New Trial and, therefore, is barred from raising the constitutional question to this Court.

Petitioner's Question for Review III also wholly fails to invoke the jurisdiction of this Court. That question alleges the Missouri Court of Appeals erred in affirming a One Million Dollar ($1,000,000) jury award as not excessive because the evidence did not warrant an award of such magnitude and because respondent's counsel made an impermissible closing argument. Petitioner also claims the trial court erred in refusing to submit a present value instruction to the jury. The alleged excessiveness of a jury verdict and a counsel's closing arguments are not federal statutory or constitutional issues and do not invoke the jurisdiction of the United States Supreme Court pursuant to 28 U.S.C. §1257(3). Petitioner's argument regarding the "present value" instruction is merely a repeat of its Question for Review II. Question for Review II is not properly before this Court, and repeating that question in Question III will not bring the various issues of Question III before this Court. On Page 5 of its Petition, petitioner states, "The Excessive One Million Dollar Verdict In This Case Resulted From Erroneous Missouri Approved Instruction System." This issue as framed

was not presented to the Missouri courts either at trial or on appeal. Petitioner refers the Court to its Motion for New Trial. (Petitioner's Appendix G, Paragraphs 28, 29). Those paragraphs claimed the verdict was excessive and against the rule of uniformity and was so excessive as to be the result of passion and prejudice. Petitioner made that same claim on appeal to the Missouri Court of Appeals. (Petitioner's Appendix I, Points Relied On Before The Missouri Court Of Appeals). These points clearly do not raise petitioner's present contention that the alleged excessive verdict was based on erroneous instructions. Petitioner did not timely raise Question for Review III in state court and cannot now raise that issue before this Court.

In summary, this Honorable Court should decline to exercise its jurisdiction over the petition for writ of certiorari because petitioner's Questions for Review I, II and III were not timely raised in the state trial court and are not properly before this Court.

STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 34(3), respondent makes the following additions to petitioner's Statement of the Case. Respondent cites to the trial court transcript.

Respondent Robert Wayne Dickerson was first employed by petitioner as a railroad policeman in 1972. (T. 115). His job duties included inspecting railway cars containing Cadillac automobiles when they arrived at the Airport Crossing just outside East St. Louis, Illinois. (TR. 122-124). In 1978, Mr. Dickerson was promoted from a policeman to a special agent, but his job duties remained basically the same. (TR. 119). The special agents were to inspect the Cadillacs because of vandalism occurring to the cars during shipment. (TR. 125, 126). During his inspections, respondent was equipped with a radio, but was not allowed by instruction of petitioner to contact the train crew to inform them he was on the train. (TR. 134, 372,

301, 302). The conductor, who gives the order for the train to move, would have no way of knowing whether a special agent was on the train inspecting or doing other work. (TR. 495-496). This method of work for agents was department policy. (TR. 138). The only way respondent would know the train was about to leave was by hearing the conversation between the conductor and engineer on his radio. (TR. 142). There were times when he would not hear the signal given by the conductor to the engineer because none was given or because of noise in the area, (TR. 143, 489) or because the radios were not working, (TR. 143, 489) or because there were no radios on the engine, (TR. 143) or because the call would go out on a different frequency than respondent's radio. (TR. 491, 492). He was not allowed to delay the train to complete his inspections. (TR. 140).

When a train stopped near the Airport Crossing, carmen were required to inspect it. (TR. 136). While the carmen or others were inspecting the train, they would place a "blue flag" or a "blue light" in front of the engine and behind the caboose. (TR. 136-139). While the "blue flag" was present, no one was allowed to move the train. (TR. 136-137, 497). Due to department policy, special agents were not allowed to place "blue flags" or "blue lights" in front of the train. (TR. 138, 301, 302, 303, 497).

On December 11, 1978, respondent was working the second shift, which started at 3:00 P.M. and concluded at 11:00 P.M. (TR. 126). He was the only special agent working that particular shift on that day. (TR. 126). Mr. Dickerson's hand-held radio was working. (TR. 145). It was shortly after 7:30 P.M. and it was dark and cold. (TR. 144). He was inspecting car no. SSW80869 on a train that contained approximately 100 cars. The car in question was approximately the 43rd car from the rear of the train (TR. 148) and 58th or 59th from the front. (TR. 149). There was noise in the area from the motors of refrigeration cars on the adjacent track. (TR. 151). While respondent was stretched around the door in a "frog like" position attemp-

ting to get on the ladder, (TR. 153) the train unexpectedly moved, causing him to lose his grip and footing and fall to the ballast rock on the ground. (TR. 154) He fell onto his buttocks and low back. (TR. 155). He had no notice that the movement was about to occur (TR. 180) and there was no radio transmission regarding any such movement. (TR. 180). The crew did not know he was on the train (TR. 494) and had no way of knowing under the method followed by the railroad. (TR. 494-496). There was no fixed time period that the train would remain stopped prior to its moving (TR. 222) so respondent would not have any set time to know that the train would move out. (TR. 496-497). It was common knowledge of individuals who worked on the railway cars that the toe room on the ladders was insufficient (TR. 139, 306) and this contributed to respondent's fall. (TR. 139, 153, 154).

As a result of his fall, Mr. Dickerson sustained severe, permanent and disabling injuries and damages. He has had four (4) painful surgeries, fourteen (14) hospitalizations, numerous trips to emergency rooms, physical therapy sessions and multiple injections to this back. (TR. 337-342, 163-172, Schultz depo, 32-64, Murphy depo, 11-50)

Respondent has been totally disabled from working since March 1981. (TR. 174). He is depressed because of the pain and his inability to work and support his family (TR. 174, 251; Murphy depo, 45; Schultz depo, 68-69) and has received psychiatric care. (Murphy depo, 55).

Respondent had lost earnings in the amount of $63,180 through December 21, 1982 (TR. 187). As of January of 1982 he would have been earning $2, 486 per month (or, $29,832 per year). Following December 31, 1982, at the age of 34 (TR. 112), respondent would have had a work life expectancy of 36 more years, to age 70. Therefore, at the time of trial, he had a future wage loss, assuming no raises or benefits, of $1,055,952 (36 years x $29,832 per year). When added to the past loss, the total lost wages are $1,119,132. There was evidence that those in Bob Dickerson's position had received raises of at least 5% per year, on average. (TR. 415).

REASONS FOR DENYING THE WRIT

I. The Missouri Court Of Appeals In *Dickerson v. St. Louis Southwestern Railway Company*, 674 S.W.2d 165 (Mo.App. 1984), Did Not Err In Affirming The Trial Court's Refusal Of Petitioner's Tendered "Present Value" Instruction Because Said Instruction Is Not Included In Missouri Approved Instructions And State Courts Are To Follow State Practice And Procedure In F.E.L.A. Cases.

As stated in his Jurisdictional Statement, it is respondent's position that petitioner has not invoked the jurisdiction of this Court. Petitioner's Question for Review I is not properly before this Court because petitioner made no offer of proof and introduced no evidence as to present value to support the instruction it now claims it was prejudicially denied by the trial court. In addition, petitioner failed to object to the denial of the instruction.

If this Honorable Court should decide petitioner's Point I is within its jurisdiction, then it is respectfully submitted the point is not one that merits the exercise of the Court's discretion to grant a writ of certiorari. Pursuant to Supreme Court Rule 17, "review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only where there are special and important reasons therefor." The character of reasons that will be considered are: "...(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals." or "(c) when a state court or federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court."

There are no special or important reasons for the Court to consider petitioner's Question for Review I. The Missouri Court of Appeals has not decided a federal question in a way in

conflict with another state court, a federal court of appeals or this Court. Petitioner has raised a procedural question that has been resolved by Missouri courts in a way consistent with the decisions of this Court. This Court has denied petitions for writ of certiorari based on this exact argument by petitioner's counsel on previous occasions. *Dunn v. St. Louis-San Francisco Railway Company,* 621 S.W.2d 245 (Mo. en banc 1981) *cert. denied sub. nom-Burlington Northern v. Dunn,* 454 U.S. 1145, 102 S.Ct. 1007 (1982) and *Bair v. St. Louis-San Francisco Railway Company,* 647 S.W.2d 507 (Mo. en banc) *cert. denied sub. nom - Burlington Northern Inc. v. Bair,* ____ U.S. ____, 104 S.Ct. 107, 52 U.S.L.W. 3263 (1983).

While respondent recognizes the denial of certiorari is not a decision on the merits, *State of Maryland v. Baltimore Radio Show,* 338 U.S. 912, 70 S.Ct. 252 (1950), it is significant that this Court repeatedly has denied petitions for writ of certiorari based on the exact same issues raised herein. Certainly, petitioner's claim is not of the substantial character warranting the exercise of this Court's discretion pursuant to Supreme Court Rule 17. The repeated raising of the same issues by petitioner's counsel to this Court can only be regarded as a delay tactic.

Petitioner's Question for Review I does not raise a federal question of substance, but rather one of procedure that has been decided in a way in accord with the decisions of this Court. It is well-established that while state courts are without power to detract from substantive rights granted by Congress in F.E.L.A. cases, they are free to follow their own rules of practice and procedure. *Brown v. Western Railway of Alabama,* 338 U.S. 294, 296, 70 S.Ct. 105, 106 (1949). It is recognized that state rules of practice and procedure govern the necessity, form and effect of instructions to the jury. 79 ALR 2d 572-575 and cases cited therein. *See also Later Case Service,* 79 ALR 2d 553-587 and cases cited therein.

In Missouri, the Supreme Court promulgates mandatory pattern jury instructions. The court is aided by a committee. In

F.E.L.A. cases, Missouri courts have adhered to the general M.A.I. Plan of Instruction, which seeks to simplify and balance the instruction process. *Bair,* 647 S.W.2d at 510.

Petitioner has claimed the trial court erred in refusing to submit Instruction No. G tendered by petitioner. The instruction is not included in M.A.I. and was as follows:

> If you find in favor of plaintiff and decide to make an award for any loss of earnings in the future, you must take into account the fact that the money awarded by you is being received all at one time instead of over a period of time extending into the future and that plaintiff will have the use of this money in a lump sum. You must, therefore, determine the present value or present worth of the money which you award for such future loss. (Petitioner's Appendix F.)

The propriety of giving such a "present value" instruction was considered by the Missouri Supreme Court in *Dunn v. St. Louis-San Francisco Railway Company,* 621 S.W.2d at 253. In upholding the trial court's refusal to submit an instruction identical to the one tendered by petitioner in this case, the court noted the M.A.I. Damage Instruction adequately explains the law regarding damages. The court also stated, "Any further explanation of the M.A.I. Damage Instruction by the tendered Instruction E is not acceptable procedure under M.A.I." (Cite omitted) *Id.*

In *Dunn,* the court went on to say the refusal to give the proffered instruction did not violate federal rights: "There is no compelling reason to limit application of the general rule that the form of the instructions and the manner in which the substantive law is submitted to the jury in an F.E.L.A. case are procedural matters governed by state law. *Rogers v. Thompson,* 308 S.W.2d 688 (Mo. 1958)." *Id.*

In *Bair,* 647 S.W.2d at 510, the Missouri Supreme Court affirmed the *Dunn* decision and stated, "there are instructions

which are abstractly correct in law which are commonly given in some jurisdictions, but which are not included in the M.A.I. Plan. The absence of an instruction does not prevent counsel from introducing evidence or making argument."

In the present case, petitioner did argue to the jury the present value of damages, but chose not to introduce any evidence whatsoever as to the present worth of the future lost earnings. Petitioner did not offer any expert testimony concerning predicted future rates of inflation, the interest rate that appropriately could be used to discount future earnings to present value, or the possible connection between inflation rates and interest rates. Absent such evidence, the jurors were left with no method to calculate the so-called "present value" of respondent's future earnings. Petitioner now claims it was deprived of substantive rights, although it was given ample opportunity to present evidence and to make closing argument on this issue.

Contrary to the arguments made by petitioner, there is no mandate from the United States Supreme Court that a present value instruction must be given in all cases involving future wage losses. In the most recent United States Supreme Court decision to touch on this subject, *Jones & Laughlin Steel Corporation v. Pfeifer,* ____ U.S. ____, 103 S.Ct. 2541 (1983), the Court noted the trial court is left with several options in determining whether it wishes to give a "present value instruction" or whether to assume that the rate of inflation and the interest rate of the money received for future lost earnings were equal and, therefore, requiring no specific "present value" instruction. In that case, the matter was left to the trial court's discretion.

Both *Chesapeake & Ohio Railway Company v. Kelly,* 241 U.S. 485, 36 S.Ct. 630 (1916) and *Jones & Laughlin,* relied on by petitioner, involved the elements of a proper "present value" instruction, but did not mandate that such an instruction be given in a F.E.L.A. case. In *Jones & Laughlin,* the Court reversed a decision by the district court, which in performing its

damages calculations, erred in applying the theory of a decision of the Pennsylvania Supreme Court as a mandatory federal rule of decision. That decision had held "as a matter of law that future inflation shall be presumed equal to future interest rates with these factors offsetting." 103 S.Ct. at 2544. In *Jones & Laughlin,* the Supreme Court discussed in detail various approaches as to present value instructions. The Court was urged to "select one of the many rules that had been proposed and establish it for all time as the exclusive method in all federal trials for calculating an award for lost earnings in an inflationary economy." *Id.* at 2555. The Court declined to do so.

Beanland v. Chicago, Rock Island and Pacific Railroad Company, 480 F.2d 109 (8th Cir. 1973) and *Sleeman v. Chesapeake & Ohio Railway Company,* 414 F.2d 305 (6th Cir. 1969), were cases brought in federal district court. It is well-established that federal practice and procedure would apply. Instructions are considered procedural matters. *Beanland* and *Sleeman* differ from the present case, in which the action was brought in state court and Missouri rules of practice and procedure apply. In *Beanland,* the trial court had failed to give an instruction proffered by the defendant that is set forth in E. Devitt & C. Blackmar, *Federal Jury Practice & Instructions* §78.13 at 205-206 (1970). *Beanland,* 480 F.2d at 115.

Although it may be error for a federal district court to decline to give an instruction accepted in federal practice, it is not error for a state court to decline to give the same instruction when it is not accepted by state practice and procedure. Petitioner's claim the Missouri Court of Appeals prejudicially erred in following established Missouri instruction practice by refusing the "present value" instruction tendered by petitioner is without merit.

In summary, the Court should deny the petition for writ of certiorari based on Question for Review I because:

1. Said question is not properly before this Court because petitioner made no offer of proof and introduced no evidence as

to "present value," and failed to object to the refusal of the instruction.

2. Said Question does not merit the exercise of this Court's discretion to grant a writ of certiorari because the Court has denied petitions based on this exact argument by petitioner's counsel on previous occasions.

3. Said Question does not raise a federal question of substance, but rather one of procedure that has been decided by Missouri courts in accord with the decisions of this Court.

II. The Missouri Court Of Appeals In *Dickerson v. St. Louis Southwestern Railway Company,* 674 S.W.2d 165, (Mo.App. 1984), Did Not Err In Affirming The Trial Court's Giving Of Missouri Approved Instruction 8.02 Because State Courts Are To Follow State Practice And Procedure In F.E.L.A. Cases And Said Instruction Did Not Infringe Upon Petitioner's Substantive Rights Nor Deny It Equal Protection.

As stated in the Jurisdictional Statement, it is respondent's position that petitioner has not invoked the jurisdiction of this Court. Petitioner's Question for Review II is not properly before this Court because petitioner did not tender a different damages instruction to the court and did not raise its constitutional claim at its earliest opportunity in the trial court.

The same reasons set out in respondent's Reason for Denying the Writ I herein are also applicable to Reason II. Petitioner's question is not one that merits the exercise of this Court's discretion to grant a writ of certiorari and does not meet the requirements of Supreme Court Rule 17. This Honorable Court has denied petitions for writ of certiorari based on this exact same argument by petitioner's counsel on previous occasions. *Bair v. St. Louis San Francisco Railway Company,* 647 S.W.2d 507 (Mo. en banc) *cert. denied sub. nom - Burlington Northern Inc. v. Bair,* ____ U.S. ____, 104 S.Ct. 107, 52 U.S.L.W. 3263 (1983). The raising of the same issue to this Court can only be regarded as a means of delaying the payment of the judgment.

As with Question for Review I, Question II raises an issue that is governed by state procedure. It is recognized that state rules of practice and procedure govern the necessity, form and effect of instructions to the jury. 79 ALR 2d 572-575 and cases cited therein.

The trial court in the present case followed the established Missouri procedure and gave M.A.I. 8.02, the damages instruction for F.E.L.A. personal injury cases, which states:

> If you find the issues in favor of plaintiff, then you must award plaintiff such sums as you believe will fairly and justly compensate plaintiff for any damages you believe he sustained and is reasonably certain to sustain in the future *as a result* of the fall on December 11, 1978, mentioned in the evidence. Any award you make is not subject to income tax.
>
> If you find plaintiff contributorily negligent as submitted in Instruction No. 8, then you must diminish the sum in proportion to the amount of the negligence attributable to plaintiff. (emphasis added). (Legal File, Instruction No. 9).

Petitioner claims the word "direct" should have been inserted before "result" to read "as a *direct* result." Petitioner's position is wholly inconsistent with federal law. Missouri's approved instruction adequately and fully sets forth the substantive federal law.

The Missouri Supreme Court in *Bair v. St. Louis-San Francisco Railway Company,* held M.A.I. 8.02 is the proper damages instruction to be given in F.E.L.A. personal injury actions. The word "direct" is deleted before "result of the occurrence" to comply with F.E.L.A. substantive law. M.A.I. 8.02, Committee's Comment (1981 Revision), citing *Wilmoth v. Chicago, Rock Island and Pacific Railroad Company,* 486 S.W.2d 631 (Mo. 1972); *Crane v. Cedar Rapids & Iowa City Ry.*

Co., 395 U.S. 164, 89 S.Ct. 1706 (1969) and *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S.Ct. 443 (1957).

In *Rogers v. Missouri Pacific Railroad Company*, the United States Supreme Court held the test in an F.E.L.A. case is "simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers*, 352 U.S. at 506, 77 S.Ct. at 448.

Missouri Approved Instruction 8.02 is consistent with federal substantive law. Petitioner's contention is inconsistent with the wording of 45 U.S.C. §51 (1939), which states in pertinent part: "Every common carrier by railroad...shall be liable...for such injury or death resulting *in whole or in part* from the negligence of any of the officers, agents, or employees of such carrier..." (emphasis added). The statute reads "in whole or in part," not as a "direct result," as now argued by petitioner. A railroad may be held liable for damages sustained as "a result" of its conduct, no matter how slight. Petitioner's claim the damages must be "a direct result" is inconsistent with federal case law and the wording of the statute itself.

The Missouri trial court correctly followed established Missouri instruction practice in giving M.A.I. 8.02. Petitioner did not tender a different instruction and its present contention it was denied equal protection under the law is without merit.

III. The Missouri Court Of Appeals In *Dickerson v. St. Louis Southwestern Railway Company*, 674 S.W.2d 165 (Mo.App. 1984) Did Not Err In Affirming The Trial Court's Acceptance Of The Jury Verdict; Did Not Err In Concluding Petitioner Had Not Requested Relief In The Trial Court Based On Respondent's Counsel's Alleged Improper Argument; And Did Not Err In Affirming The Trial Court's Refusal Of A "Present Value" Instruction That Is Not Included In Missouri Approved Instructions.

In its Question for Review I, petitioner herein has argued the trial court erred in failing to submit a "present value" instruction. Petitioner repeats that same claim in its Question for Review III. For the reasons respondent discussed in Reasons for Denying Writ I, a "present value" instruction was not required. For the first time, petitioner now claims the failure to give the "present value" instruction was a "major factor" leading to an excessive verdict. Petitioner did not make this claim in its Motion for New Trial nor in its points on appeal to the Missouri Court of Appeals.

On appeal to the Missouri Court of Appeals, petitioner contended the verdict was excessive as a result of an "impassioned and inflamed jury." (Petitioner's Appendix I, Points Relied On Before The Missouri Court of Appeals). In *Dickerson v. St. Louis Southwestern Railway Company*, 674 S.W.2d 165, 173 (Mo.App. 1984) (Petitioner's Appendix A), the court found:

> In its last point relied on, appellant contends that the verdict was grossly excessive. This court has reviewed the record and determined that the evidence of respondent's lost wages, medical expenses and pain and suffering adequately support the One Million Dollar verdict.

Petitioner's arguments overlook the finding of the Missouri Court of Appeals that the verdict includes damages for "pain and suffering." *Id.* The jury award was not based solely on respondent's loss of future earnings. Bob Dickerson had endured years of pain before trial and the evidence showed he would continue to suffer in the future. The verdict was not excessive. The Missouri Court of Appeals reviewed the evidence and found:

> Respondent has been hospitalized several times and undergone several operations on his back since the fall, but he is nonetheless in constant pain and cannot lie down, sit or stand for extended periods of time. Respondent can no longer enjoy the outdoor activities in which he used to par-

> ticipate with his family, such as hiking, camping, fishing, water skiing, working around his farm and going to ballgames. His personal relationship with his wife has deteriorated. Respondent, although once a happy man, is now irritable, depressed and unhappy.
>
> In addition, respondent's evidence showed that he was totally and permanently disabled. Appellant produced the testimony of one physician who indicated that appellant could perform a sedentary job, but this physician could not name any one specific job for which respondent was suited. *Dickerson,* 674 S.W.2d at 168.

It is well-established that state rules govern with respect to the reviewability of questions of the excessiveness of damages and with respect to remittitur practices. 79 ALR 568-569. *Louisville & N.R. Co. v. Holloway,* 246 U.S. 525, 38 S.Ct. 379 (1918). The question of excessiveness of a verdict is a non-federal question and one, therefore, that has been decisively determined by the Missouri courts. *See also Rogers v. Thompson,* 308 S.W. 2d 688 (Mo. 1958).

Petitioner's claim that respondent's counsel made an impermissible argument also is a non-federal question and was resolved in *Dickerson,* 674 S.W.2d at 170. The court stated:

> Appellant's third contention is that the trial court erred in denying appellant a new trial when respondent's counsel argued to the jury that respondent's future wage lass could be calculated by increasing respondent's salary by 5% per year and by multiplying respondent's annual salary by the number of his employable years. After the remarks by respondent's counsel, appellant's counsel objected. The objections were sustained. No further relief was requested. This court will not fault the trial court for failing to *sua sponte* grant a mistrial. *See Griffith v. St. Louis-San Francisco Railway Company,* 559 S.W.2d 278, 281 [5] (Mo.App. 1977).

Petitioner's Question for Review III is without merit.

CONCLUSION

In summary, petitioner's writ of certiorari should be denied because:

1. Petitioner has not properly invoked the jurisdiction of the United States Supreme Court pursuant to 28 U.S.C. §1257(3).

2. Petitioner's Questions for Review were not timely raised in the state trial court and are not properly before this Court.

3. Petitioner's Questions for Review I and II do not merit the exercise of this Court's discretion to grant a writ of certiorari because the Court has denied petitions based on these exact same arguments by this same counsel now representing petitioner. *See Dunn v. St. Louis-San Francisco Railway Company,* 621 S.W.2d 245 (Mo. en banc 1981) *cert. denied sub. nom - Burlington Northern v. Dunn,* 454 U.S. 1145, 102 S.Ct. 1007 (1981) and *Bair v. St. Louis-San Francisco Railway Company,* 647 S.W.2d 507 (Mo. en banc) *cert. denied sub. nom - Burlington Northern Inc. v. Bair,* ____ U.S. ____, 104 S.Ct. 107, 52 U.S.L.W. 3263 (1983). The repeated raising of the same issues to the Court can only be regarded as a delay tactic.

4. Petitioner's Questions for Review I and II raise issues of procedure that are governed by State rules and practice. The trial court followed established Missouri instruction practice and said practice did not infringe upon petitioner's substantive rights under the F.E.L.A. or upon its guarantee to equal protection.

5. Petitioner's Question for Review III raises questions of the excessiveness of damages and the propriety of counsel's closing argument. Both issues are non-federal questions and have been decisively determined by the Missouri courts.

6. Any claims of error advanced by petitioner are harmless, insubstantial and immaterial. There has been no showing petitioner has been prejudiced by any of the trial court's alleged errors. All of petitioner's claims of error go to the issue of damages, and those damages are not excessive with or without the claimed errors. The evidence supports the conclusions of the trial court and of the Missouri Court of Appeals that the damages are not excessive based on respondent's medical expenses, lost earnings and past and future pain and suffering. Petitioner's claims have been considered and denied by the Missouri appellate courts. There is now no sound reason for this Court to consider the claims.

For the above reasons, respondent requests this Court to deny petitioner's Writ of Certiorari to the Missouri Court of Appeals, Eastern District. If this Court should find there has been error, respondent respectfully asks that the Court remand the case for trial as to damages only. Petitioner has not raised the issue of liability. All of petitioner's points of alleged error relate to damages.

Respectfully submitted,

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